SUPPORTING BRIEF

Petitioners also file herewith and make part of this application their brief in support hereof.

PRAYER

Wherefore, petitioners respectfully pray that a writ of certiorari may issue to the Honorable the United States Circuit Court of Appeals for the Fifth Circuit, to the end that this cause may be reviewed and determined by this Court; and that the judgment of the said United States Circuit Court of Appeals for the Fifth Circuit may be in due course reversed and set aside, and that judgment may be rendered in favor of petitioners, setting aside their conviction and sentences pronounced below, and discharging them forthwith; and petitioners pray for all further and necessary orders proper in the premises, and for all such relief as the nature of the case may justify.

T. W. HOLLOMAN
T. FRITH HUNTER
JOHN R. HUNTER
Attorneys for petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The first reason relied on for allowance of the writ is that the constitutional and statutory rights of petitioners were infringed by a conviction of using the mails in furtherance of a scheme to defraud, when the mailing charged was made after the deal was closed and consummated. The fraud as alleged in the indictment con-

cerned a deal between the Dunnam Motor Company of Alexandria (the local Ford agent), and the City of Alexandria for the purchase of certain buses to be used on the streets of Alexandria. The undisputed evidence shows that the City of Alexandria issued its check in favor of the Dunnam Motor Company for the agreed price of the buses and that said check was drawn on the Guaranty Bank & Trust Company, a local bank; that the Dunnam Motor Company deposited the check of the City in the Guaranty Bank & Trust Company and received credit on their account for the same. We take the position that when this payment was made and the credit given the Dunnam Motor Company that the deal was consummated, and that any subsequent use of the mails by any party other than the principals named, is not and was not such a case as is contemplated by the Mail Fraud Statute.

We take the position that the mailing or causing of the letter to be mailed is the crime and not merely devising a fraudulent scheme, and that it is vital to the commission of the offense that the letter be mailed in furtherance of the scheme. We take the position that no letter was mailed in furtherance of the scheme and that the mailing charged in the indictment and proven in the case was done after the deal had been consummated, and therefore did not support the charge or justify the conviction.

Dyhre vs. Hudspeth, 106 F (2) 286;

Floyd D. Stapp, et als vs. U. S., 120 F. (2) 898;

Spillers vs. U. S., 47 F. (2) 893;
McNear vs. U. S., 60 F. (2) 861;
Armstrong vs. U. S., 65 F. (2) 853;
Little vs. U. S., 73 F. (2) 861;
Merritt vs. U. S., 95 F. (2) 669.

The second reason relied on for the allowance of the writ is that the constitutional and statutory rights of petitioners have been infringed by the Court's overruling the motion for a directed verdict at the close of all the evidence in the case. This proposition involves the review of all the evidence in the case, and we respectfully request the Court to consider the summary of the evidence and our argument under Assignment of Error # 3 as contained in the brief of Appellants filed in the Circuit Court of Appeals.

Briefly summarized the evidence in the record shows that the City of Alexandria advertised for bids on eight buses; that bids were offered by several companies; that the lowest bid was that of the Ford Agency in Alexandria; that all of these bids were rejected. That subsequently, the City bought from the Ford Motor Company, through its local representative, the Dunnam Motor Company eight (8) buses, and that the price paid by the City was Four Hundred Twenty-Five & No/100 ($425.00) Dollars cheaper per unit than the lowest bid received.

We submit that the testimony of all the witnesses, including the Government witnesses, established conclusively that it was impossible for the City to have

bought these buses any cheaper; that they could not have been bought directly from the factory, and that the prices paid were exceedingly reasonable.

We submit that these facts have been established. It follows that no fraud was perpetrated upon the City of Alexandria but that on the contrary the rights of the citizens of Alexandria were not only respected but protected in the deal that was made. We submit that under the summary of the evidence above referred to there was nothing to show that W. T. Bradford and Ben F. Bradford were associated in this deal, but on the contrary that they were personally and policitally opposed one to the other, and that W. T. Bradford did not undertake to influence any of the City Commissioners in the deal that was made.

We submit that the evidence shows that W. T. Bradford was promised a commission of five (5%) per cent by one Ahrens, who was connected with the Transit Bus Corporation of New Orleans, who were interested in the deal as selling agents with the Dunnam Motor Company, and that W. T. Bradford, as Judge Sibley says in his dissenting opinion, "was paid a good deal for doing very little."

In this connection we quote briefly from the dissenting opinion of Judge Sibley of the Circuit Court of Appeals, who speaking of Ben F. Bradford, says:

> "He was paid money in connection with the sale. While the evidence is not strong against him, it

> justifies a verdict under the principles decided in the Shushan case."

and continuing Judge Sibley says:

> "I find no evidence at all that W. T. Bradford had any part in or knowledge of the corrupting of Ben Bradford. The evidence touching W. T. Bradford is hardly a score of lines in the record. ****Nothing suspicious, much less criminal, is shown to have been done by W. T. Bradford."

We submit that a consideration of all the evidence in the case as shown by the record and summarized in the brief of Appellants warrants a review of the case as to both defendants.

We next wish to call attention to an error of law contained in the majority opinion of the Circuit Court of Appeals and repeating in the opinion rendered in refusing a hearing herein, with respect to the failure of W. T. Bradford to take the witness stand and testify in his own behalf. As we read the opinion of the Circuit Court of Appeals on this point, it almost goes to the point of holding that the failure of an accused to take the witness stand creates a presumption of guilt against him.

In passing upon our petition for a rehearing Judge Holmes, who handed down the original decision, declares:

> "No man can be compelled to be a witness against himself, but sometimes in the progress of a trial the

burden of going forward with the evidence may require the accused to produce testimony for himself or suffer an inference of guilt from facts already proven to be drawn against him by the jury."

We submit that this is not the law, and that the holding is tatamount to a declaration that were the accused fails to take the stand, the burden of proof shifts from the State to the defendant. We think this is manifestly erroneous because the burden of proof is on the Government to prove the guilt of the accused and the presumption of innocence protects the defendant from any contrary presumption arising from his failure to testify, and the burden still remains with the Government, and such failure to give evidence in his own behalf cannot properly be construed against him or in favor of the Government.

Wilson vs. U. S., 149 U. S. 60, 37 Law Edition 650.

Groves vs. U. S., 150 U. S 118; 37 Law Edition, 1021.

Among the reasons assigned for the allowance of the writ is that both the lower Court and the Appellate Court failed to set aside the verdict on the gound set forth in the motion in arrest of judgment that only eleven (11) of the purors who participated in the trial of the case were legally drawn thereon.

The Trial Judge and the Appellate Court did not consider that this matter contained any merit and summarily dismissed the objection without comment. We

submit that the motion in arrest of judgment and the supporting affidavits attached thereto show that one James G. Russell was drawn on the jury, and that James G. Russell, Jr., was served, came to Court and became the Foreman of the Trial Jury. There is no dispute on this proposition, and we think the record convincingly shows that the man drawn on the jury did not serve, and that the party who did serve on the jury was not drawn thereon. We submit that this objection is not only serious but vital. We submit that the law requires the concurrence of twelve (12) jurors in order to render a legal verdict, and the participation of a juror who was not drawn on the panel would deprive petitioners herein of their right to a jury legally impaneled and to a verdict supported by all twelve (12) of the jurors legally drawn. We earnestly submit that the motion in arrest of judgment is good, and that fatal error exists which of itself is sufficient to justify a review of the whole case.

We further contend that there was error in the judgment of the Circuit Court of Appeals in overruling all of the Assignments of Error contained in the record, and in addition to the matters hereinabove presented, we wish to emphasize as special error the refusal of the Trial Judge to permit the witness, Moriarity, who was tendered in support of a motion for a new trial, to testify as to the cost of the buses, when he said witness could have shown that the testimony of L. O. Taylor, Government expert, was grossly erroneous.

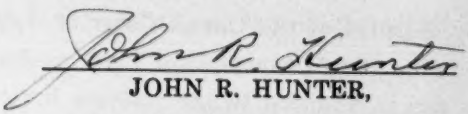
This matter becomes important because the Circuit

Court of Appeals bases its opinion largely on the proposition that the basis of the fraud was the exorbitant price charged the City of the buses. The error we suggest in this connection was the refusal of the Trial Judge to permit Moriarity to testify because he was not an expert, when the record shows that he had had more experience in the automobile business than Taylor, the Government witness, who had spent his life as a Post Office Inspector.

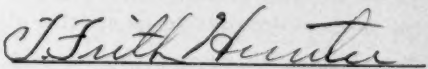
CONCLUSION

We respectfully urge that the issues raised by this case are serious and important ones, and that the errors of law complained of present rulings contrary to the established jurisprudence of the United States Supreme Court, and that, to the end that those errors may be rectified, a writ of certiorari should issue.

Respectfully submitted,



JOHN R. HUNTER,



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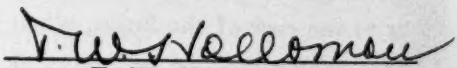

T. W. HOLLOMAN,

Attorneys for Petitioners.